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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 599

LOUIS MITCHELL, RALPH LIPSCOMB, JACK CROWLEY, FRED PETERS, CARL PHILLIPS MAUS, BABE W. BOWMAN, KENNETH OLSON, CLAYTON CASH, ARLING MARTYN, HERBERT STOWE, JOHN PEARSON SMITH, JR., SONNY DAWSON,

Petitioners,

vs.

WHITE CONSOLIDATED, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Court of Appeals improperly *refused to exercise jurisdiction,* in this appeal taken under original Rule 73(a), because:

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Petitioners,

vs.

WHITE CONSOLIDATED, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Summary and Statement of Matter Involved.

Petitioners claim they have been *denied access* to their Court of Appeals in a case where that Court *has* jurisdiction but has *refused to exercise* it, and has dismissed their appeal, through a misinterpretation and misapplication of amended Rules 73(a) and 86(b) of Civil Procedure.

Petitioners are twelve plaintiffs who were injured in the same collision of defendant-respondent's bus on which they were passengers. Their twelve personal injury complaints were consolidated in the District Court (N. D. Ind.), and their amended complaint (R. 6) was dismissed for alleged failure to state a claim (R. 29). They appealed and their appeal was dismissed for supposed lack of jurisdiction in the Court of Appeals (R. 56).

Judgment of dismissal was entered by the District Court on March 16, 1948 (R. 29) three days *before* the effective date of the amended Rules, March 19. Petitioners filed notice of appeal on June 10, 1948 (R. 29), within the ninety days provided by *original Rule* 73(a) but less than the thirty days provided by *amended Rule* 73(a). The District Court, on July 7, 1948, entered an order reciting that "an appeal *is pending*" in this case and extending the time to file the transcript in the Court of Appeals until August 19, 1948 (R. 40). Petitioners filed the transcript August 13 (inside cover of record). Appellee-respondent entered its general appearance in the appeal on August 19. The transcript was printed and the printed record filed September 21 (R. 41). Then defendant-appellee moved on September 28 to dismiss the appeal for alleged *lack of jurisdiction* of the Court of Appeals, on the ground that failure to file notice of appeal within thirty days caused an *absolute lack* of jurisdiction (R. 48).

The Court of Appeals sustained the motion to dismiss, without opportunity for argument, in a five line memorandum opinion, dated November 12, 1948 (R. 56), which is *not reported,* so far as we can find, and which reads:

> "On motion of counsel for the defendant-appellee, it is ordered and adjudged by this Court that

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this appeal be, and the same is hereby, Dismissed, on the authority of Cause No. 9652—*Marsh B. Ray, et al.* v. *Edward Morris, et al.*, decided by this Court on November 11, 1948" (R. 56).

The above case of *Ray* v. *Morris,* which is the sole basis for dismissing our appeal is reported as:

Ray v. *Morris* (7 Cir. 1948), 170 F. 2d, 498.

In *Ray* v. *Morris,* the Court of Appeals *refused to exercise jurisdiction* and dismissed the appeal on the ground that the thirty day requirement of amended Rule 73(a) is "*jurisdictional* and *cannot be avoided* • • •. However much we *regret* it, we *must* allow the motion" to dismiss. (Our emphasis.) (170 F. 2d, at p. 499, pars. 2 and 3.)

The Indiana two-year statute of limitations (Sec. 2-602 Burns Ind. Sts. 1933) makes it impossible for these twelve petitioners who were injured in 1941 (R. 6) to file a new action. Hence, the District Court's dismissal of their complaint cuts off their action, and the Court of Appeal's dismissal of their appeal cuts off their right of review.

The points here presented to show that the Court of Appeals improperly refused to exercise jurisdiction are:

(1) Final judgment (R. 29) was entered in the District Court *before* the effective date of *amended Rule* 73(a), so petitioners contend they had an *absolute* right of appeal within ninety days under the former procedure.

(2) If the right was not absolute, at least *amended Rule* 86(b) gave the Court *discretion* to apply the former procedure, and the District Court did this by its order (R. 40) extending the time to file the transcript in the Court of Appeals, but this order was *ignored* by the Court of Appeals.

(3) The thirty day requirement of *amended Rule* 73(a) *could not* be jurisdictional in *any* "pending action", because *amended Rule* 86(b) gives the courts *discretion* to waive it in any pending case. A *jurisdictional* requirement *could not* be waived.

(4) A directly contrary result was reached by the *Second* Court of Appeals under similar facts, where judgment was entered *before* the effective date of the amended Rules, and the Second Court of Appeals entertained the appeal, though notice of appeal was filed *more than thirty days* after judgment, in *McAllister* v. *Cosmopolitan Shipping Co.* (2 Cir., 1948), 169 F. 2d 4, 7. Petitioners have been denied the same access to their *Seventh* Court of Appeals which was given to *McAllister* in the *Second.*

Basis of Jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C. 1254. A timely petition for rehearing was overruled by the Court of Appeals on December 1, 1948 (R. 77) and this petition is filed within ninety days thereafter.

Questions Presented.

Whether the Court of Appeals erred in *refusing to exercise jurisdiction.* This is the sole question presented, because this appeal was dismissed (R. 56) solely on the authority of *Ray* v. *Morris,* 170 F. 2d 498, and the latter appeal was dismissed solely for supposed *absolute lack* of jurisdiction (p. 499, pars. 2 and 3).

Reasons Relied On for Allowance of Writ.

This does not involve *mere error* but the more serious matter of denying petitioners access to their Court of Appeals—their right of review—where that Court

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has jurisdiction but has *refused to exercise* it, due to its misinterpretation and misapplication of amended Rules 73(a) and 86(b) of Civil Procedure, in each of the following respects:

I.

This Court's *amended Rules* 73(a) *and* 86(b) *of Civil Procedure* (which have the effect of procedural *statutes*) have been misconstrued and misapplied so as to cut off the right of appeal of these twelve personal injury plaintiffs.

Final judgment of dismissal was entered by the District Court on March 16, 1948 (R. 29).

Amended Rule 73(a) reducing the time for appeal from ninety to thirty days, did not become effective until March 19, 1948, three days *after* the entry of judgment. (*McAllister* v. *Cosmopolitan Shipping Co.*, (2 Cir. 1948), 169 F. 2d 4, 7, par. 4.)

Amended Rule 86(b) makes the amended Rules apply to "actions then *pending,*" at the effective date:

> "• • • They (amended Rules) govern all proceedings in actions *brought after* they take effect and also all further proceedings in *actions then pending,* except to the extent that in the *opinion of the court* their application in a particular action *pending when* the amendments take effect *would not be feasible or would work injustice* in which event the *former procedure* applies." (Our emphasis.)
>
> *Amended Rule* 86(b) *of Civil Procedure.*

The entry of judgment "terminated" this action and *it was not an "action pending"* at the time the amended Rules took effect:

Winkelman v. *General Motors Corporation* (D. C. S. D. N.Y. 1942), 48 F. Supp. 490, headnote 6.

Bourne v. *Southern Railway Co.* (1944), 224 N.C. 444, 31 S.E. (2d) 382, 383, pars. 1 and 2.

Commercial Credit Co. v. *Ramsey* (Texas C. of A. 1940), 138 S.W. (2d) 191, 194.

State v. *Coleman* (1941), 347 Mo. 1239, 152 S.W. (2d) 640, 649.

Hence, the thirty day provision of *amended Rule* 73 (a) did not apply, and petitioners' right to appeal within ninety days under the former procedure was *absolute.*

The Court of Appeals dismissed this appeal *solely* on authority of *Ray* v. *Morris,* (7 Cir. 1948), 170 F. 2d 498 (R. 56). But that case does not cover the above point, because in that case "judgment was entered ten days *after* the effective date of the rule" (p. 499, par. 3) (R. 64).

II.

If this case was an "action pending" at the time the *amended Rules* took effect, the Court at least had *discretion* to apply the former procedure. (Amended Rule 86(b), quoted *supra.*)

This discretion was in the District Court prior to filing the transcript above. That Court *exercised* the discretion in our favor by its order of July 7, 1948, reciting that "an appeal *is pending*" and extending the time for filing the transcript above:

> "It appearing to the Court that *an appeal is pending* in the above entitled cause to the United States Circuit Court of Appeals, that the forty (40) day period already allowed by Rule 11(1) of the

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Rules of the United States Circuit Court of Appeals for the Seventh Circuit, will expire on July 20, 1948, and for *good cause shown to the Court,*

It Is Hereby Ordered by the Court, that the time within which the transcript of record in this cause shall be filed with the Clerk of the United States Circuit Court of Appeals be and the same hereby is extended and enlarged thirty (30) days from and after the 20th day of July, 1948." (Our italics.) R. 40.

Pursuant to the above order granting until August 19, 1948 to file the transcript above, the appellants (petitioners) filed the transcript there on August 13, 1948 (see bottom of inside cover of record). Appellee (respondent) entered its general appearance to the appeal, without objection, on August 19, 1948 (R. 44). Appellants (petitioners), relying on that order and appearance, caused the record to be printed and filed the printed record September 21, 1948 (R. 41). Thereafter, on September 28, 1948, appellee (respondent), for the first time in either court, made known its contention that the notice of appeal should have been filed below within thirty days, by filing its motion to dismiss the appeal (R. 47-48).

Amended Rule 86(b), above quoted, gives the courts very broad power to "apply the former procedure" in a "pending action" wherever "in the opinion of the court" the new practice "would not be feasible or would work injustice." *No formality* is required for the Court to manifest that "opinion." It was clearly and sufficiently manifested in this case by the above quoted order reciting that "an appeal is pending" and extending time to file the transcript (R. 40). Any other interpretation of the order would make it a mockery designed to trap appellants into the futile expense of filing and printing the record above.

III.

No lack of jurisdiction was caused by the fact that appellants (petitioners) filed notice of appeal under the former procedure instead of under the amended Rules. The discretionary clause in *amended Rule* 86(b) applies to *all* the amended Rules, including 73(a) which reduces the time for notice of appeal from ninety to thirty days. The *purpose* of this discretionary clause was to *save* the jurisdiction of the Courts to "apply the former procedure" in "pending actions". This would be true whether the discretion were exercised by the District Court before the transcript went up, as in our case, (point II, *supra*), or was exercised by the Court of Appeals after the transcript went up, as in the conflicting *McAllister* case (point IV, *supra*).

Accordingly the Court of Appeals erred in holding that the thirty day requirement of *amended Rule* 73(a) is "*jurisdictional* and *cannot* be avoided", and hence, "however much we *regret* it, we must allow the motion" to dismiss, in the case of *Ray* v. *Morris,* (7 Cir.) 170 F. 2d 498, 499, pars. 2 and 3. (Our emphasis.) On the sole authority of that case and that ruling the Court dismissed these petitioners' appeal (R. 56).

The grant of discretion in *amended Rule* 86(b) *repels* the idea that the thirty day clause in *amended Rule* 73(a) was *jurisdictional* in pending actions. There *could not* be discretion by any court to waive a *jurisdictional* requirement. (*Mitchell* v. *Maurer,* 293 U. S. 237, 244.) There was no petition for certiorari in the above case of *Ray* v. *Morris,* 170 F. 2d, 498, so this Court has had no opportunity to review the erroneous jurisdictional proposition which the Seventh Court of Appeals laid down in *Ray* v. *Morris* on November 11, 1948, and upon which it dismissed these petitioners' appeal *the next day,* November 12, 1948 (R. 56).

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As above stated under Point I, *Ray* v. *Morris* is *not* authority on petitioners' first proposition that the right to a ninety day appeal is *absolute* when judgment was entered *before* the amended Rules took effect. It is authority,—and erroneous authority which this Court should correct,—for the unsound proposition that the Court has *no discretion* to *entertain* an appeal under the "former procedure" in a "pending case," which makes *amended Rule* 86(b) *meaningless* as applied to *amended Rule* 73(a).

IV.

The *Seventh* Court of Appeals decision that jurisdiction *does not exist* in this case conflicts with the *Second* Court of Appeals decision that jurisdiction *does exist* under similar circumstances in:

McAllister v. *Cosmopolitan Shipping Co.* (2 Cir. July 23, 1948) 169 F. 2d 4, 7, par. 4.

In that case "the judgment of the District Court was entered on February 24, 1948" which was twenty-four days *before* the effective date of the amended Rules, March 19, 1948 (169 F. 2d at p. 7, par. 4). In the present case, judgment was entered March 16, 1948, three days *before* the effective date (R. 29). The *McAllister* case, *supra,* does not decide our first proposition of *absolute right* to appeal. This point apparently was not raised in that case. It does decide that *jurisdiction exists* to *entertain* an appeal taken more than thirty days after a judgment under circumstances similar to ours. In fact our case is stronger in favor of jurisdiction, because there was no extension order by the District Court in the *McAllister* case, as there is in ours.

The decision in our case actually rests on the erroneous proposition that the Court of Appeals has *no jurisdiction* to *entertain* the appeal, because the five line

memorandum opinion expressly recites: "Dismissed *on the authority* of Cause No. 9652—*Marsh B. Ray* v. *Edward Morris*, decided by this Court on November 11, 1948" (R. 56), wherein the Court had erroneously held it lacked jurisdiction and "However much we *regret it*, we *must* allow the motion" to dismiss. (Our emphasis.) *Ray* v. *Morris*, 170 F. 2d, 498, 499, par. 3.

This is not a case where the Court of Appeals *exercised discretion* to apply the new, rather than the former procedure to our appeal. It acted on the erroneous premise that *no jurisdiction existed*, and hence *no room for discretion*. This is shown by its action of ignoring the District Court's order exercising the discretion (R. 40) and its action of dismissing solely on authority of *Ray* v. *Morris* (R. 56) wherein it had expressed "regret" over its supposed lack of jurisdiction (170 F. 2d, at p. 499, par. 3).

Refusal to entertain jurisdiction where it *exists* is always good ground for review by this Court, because it is not *mere error* but is a *denial of access to the federal Judiciary*. This is particularly true where, as here, the jurisdiction has been affirmed by one Court of Appeals and denied by another,—resulting in a situation where *McAllister* was given access to his *Second* Court of Appeals in his personal injury case (169 F. 2d 4) while these twelve petitioners were denied access to their *Seventh* Court of Appeals in their personal injury case.

Wherefore, petitioners respectfully pray this Court to issue its Writ of Certiorari to review this case, and for all further proper orders.

Respectfully submitted,

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JAY E. DARLINGTON,
Attorneys for Petitioners.

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No. 599. MITCHELL ET AL. *v.* WHITE CONSOLIDATED, INC. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals dismissing the appeal is vacated and the cause remanded to it to determine, pursuant to Rule 86 (b) of the Rules of Civil Procedure, whether the application of amended Rule 73 (a) to this particular action would work injustice. *Jay E. Darlington* for petitioners.

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